



April 7, 2017

TATOA Regulatory Alert

Yesterday the Texas Senate passed the committee substitute of SB 1004, a bill that will grant mandatory access to municipal rights-of-way for small cell wireless installations on city-owned poles and municipally-owned utility poles. SB 1004 would create a new Chapter 284 of the Local Government Code. Under the proposed Chapter 284, a “network provider,” which may include a wireless carrier, cable operator, or infrastructure provider that leases small cell wireless installations to wireless carriers, would have access to municipal rights-of-way (“ROW”) for the installation of “network nodes” (small cell wireless equipment), “micro network nodes” (strand supported Wi-Fi access points), and “node support poles” (standalone poles to support network nodes). Network providers would have mandatory access to “service poles,” which include city-owned traffic light poles, streetlight poles, and sign poles. In addition, network providers would be able to access municipally-owned utility poles subject to nondiscriminatory terms and pursuant to a pole attachment agreement.

The bill is missing important protections for local governments:

- *The bill should include a provision to require protection against harmful interference with municipal use of unlicensed frequencies. This is a public safety issue.*
- *Each micro network node should be subject to a \$50 annual ROW fee.*

Summary of SB 1004

Municipal Rates

Under the new Chapter 284, network providers would pay the following fees to cities:

- *Network Node Rent* – \$250 per year per network node, which may be adjusted annually by one-half the consumer price index
- *Transport Facility Rent* – \$28 per month per transport facility (fiber backhaul to serve the network node)
- *Pole Attachment Rent* – \$20 per year for use of city-owned service poles
- *ROW Permit Fee* – Cities may charge ROW application permit fee that is the lesser of actual processing cost or \$100 per application covering up to 5 network nodes and \$50 for each

additional network node per application, and fee may not include cost of third-party legal or engineering review of application.

- *Note: Micro network nodes (cable Wi-Fi access points) are not subject to paying any municipal fees.*

Antenna Dimensions

Antennas may be installed on a pole individually or inside enclosure subject to:

- May not exceed 6 cubic feet in volume
- May extend three feet vertically above a pole
- May protrude two feet horizontally from a pole

Equipment Cabinet Dimensions

Equipment cabinets may be pole-mounted or ground-based subject to:

- May not exceed 28 cubic feet in volume
- May stretch five feet vertically on a pole
- May protrude two feet horizontally from a pole
- Ground-based cabinets may not exceed 3.5' X 3.5' X 3.5'

Pole Height

A pole that is modified, replaced, or installed to accommodate a network node may not exceed the greater of 10 feet above the tallest utility pole within 500 feet or 50 feet above ground level.

Municipal Design Manual

A municipality may adopt a design manual for the installation and construction of network nodes and node support poles in municipal ROW.

Note: The design manual may include technical and make-ready construction standards for installing network nodes on city owned service poles.

Permitting Process

Municipalities must comply with the following application permitting requirements:

- **Application Contents** – Application may include (1) construction and engineering drawings complying with municipal design standards; (2) information demonstrating compliance with applicable municipal codes, including uniform building, fire, electrical, plumbing, or mechanical codes; (3) information demonstrating compliance with street planning regulations; and (4) certificate of FCC compliance for network node.
- **Consolidated Application** – Single application may include request for up to 30 network nodes for which city shall authorize under one permit.

- ***Node Support Pole Application*** – Approve or deny the application within 150 days of receipt. Application that is not acted upon timely shall be deemed approved.
- ***Network Node Application*** – Approve or deny the application within 60 days of receipt. Application that is not acted upon timely shall be deemed approved.
- ***Transport Facility Application*** – Approve or deny the application within 21 days of receipt. Application that is not acted upon timely shall be deemed approved.
- ***Review Process Applicable to All Applications*** – City must determine whether application is complete within 30 days (10 days for transport facilities). If application is incomplete, city must identify the missing information. If the application is denied the city must document the basis for the denial and notify applicant by email. Applicant may cure the application within 30 days, and city shall approve or deny the revised application within 90 days of receipt. Applications that are not approved or denied within the time requirements shall be deemed approved.
- ***Prohibition on Moratoria*** – Moratoria, express or de facto, are prohibited on filing, receiving, or processing applications or issuing permits for installation of network nodes or node support poles.
- ***Prohibition on In-Kind Contributions*** – City is prohibited from requesting in-kind contributions as part of permitting process, such as reserving fiber, conduit, or pole space for the municipality.
- ***Installation in Residential Areas*** – New node support poles may not be installed in ROW without City’s consent if ROW is not more than 50 feet wide and adjacent to single-family or multi-family residential lots, or undeveloped land designated as such by zoning or deed restrictions.
- ***Compliance with Undergrounding Requirements*** – Facilities must comply with City undergrounding requirements that prohibit above-ground installations without obtaining zoning or land use approval.
- ***No Application Required*** – City may not require an application for the installation of a micro network node, or for the routine maintenance or upgrade of a network node that does not require excavation or lane closures. The upgrade of a network node may include replacement or modification of equipment or pole that is “substantially similar” as this phrase is defined in the bill. City may require, however, advance notice of a network node upgrade.
 - ***Note: Micro network nodes (cable Wi-Fi access points) are specifically excluded from the requirement to submit ROW applications. Consequently, cities will not have notice of where these wireless devices will be installed.***

Protection of Historic Districts and Decorative Poles

A network provider must obtain advance approval from a municipality prior to any network node installation on a decorative pole or on any pole located within a historic district. The city may require reasonable design or concealment measures as a condition for allowing such installations.

Relocation of Network Nodes

Network providers are required to relocate network nodes at their own expense to accommodate civic projects.

Indemnification

Cities are entitled to indemnification for claims related to network nodes installed on municipal ROW.

Radio Frequency Interference

Network providers may not cause harmful radio frequency interference to FCC authorized mobile telecommunications operations of a municipality operating at the time of the network node installation.

Note: This is merely a restatement of federal law. The bill does not address harmful interference with municipal use of unlicensed radio frequencies, including Wi-Fi related frequencies.

Prohibition on Imposing Additional Fees

Municipality is prohibited from adopting or enforcing any regulations or requirements not authorized by Chapter 284 that would require a network provider or its affiliated cable and video providers certificated under Chapter 66 of PURA to obtain any additional authority or pay any fees based on the provider's provision of wireless service over network nodes, including micro network nodes.

Note: This protection specifically applies to cable and video providers. It means that local governments will not be able to claim that video streaming services received by cable customers over network nodes or micro network nodes will be subject to cable franchise fees in the amount of 5% of gross revenues.

Access to Municipally Owned Utility Poles

The governing body of a municipally owned utility must allow network nodes to be installed on municipally owned utility poles subject to nondiscriminatory terms and pursuant to a pole attachment agreement. The statutory requirements applicable to ROW application permits do not apply to municipally owned utilities and a network provider will be subject annual rent based on the pole attachment rate applicable to wire attachments applied on a per-foot basis to the pole space occupied by a network node.

Analysis of Missing Protections

Concerns for Municipal Governments

While it is unlikely that municipalities will be able to stop passage of SB 1004, as discussion of the bill moves to the House of Representatives (HB 2838), local governments should focus on the following issues:

- ***Unlicensed Spectrum Interference*** – Many local governments use Wi-Fi and other unlicensed frequencies for municipal operations including hot spots at libraries and public spaces, wireless relays for routing traffic signals, public safety communications, water utility operations, and other uses. When two Wi-Fi devices are placed in close proximity to each other, the more powerful device will interfere with the signal of the lower-powered device. Local governments should expect commercial-grade Wi-Fi wireless devices to cause harmful interference with municipal operations that utilize Wi-Fi frequencies. There is no process under this bill to identify the location of new Wi-Fi installations. Therefore, when interference occurs, the source of the interference will be unknown and there will be no process in place to address the issue. Prevention is the proper solution, especially with regard to municipal operations of critical infrastructure.
 - ***Remedy:*** *The bill should include a provision to require protection against harmful interference with municipal use of unlicensed frequencies. This is a public safety issue.*

- ***Level Playing Field Regarding Cable Industry*** – Under the new Chapter 284, wireless carriers will pay for the use of ROW for network nodes, but cable operators will not be subject to any fees for the installation of micro network nodes. This is discriminatory treatment of wireless service providers and local governments. Micro network nodes should be subject to ROW rent based on the propagation characteristics of Wi-Fi equipment which has a 4:1 or 5:1 coverage ratio compared to a small cell installation. Accordingly, micro network nodes should pay at least 20% of the \$250 ROW rent applicable to network nodes or \$50 per Wi-Fi access point.

It is reasonable that micro network nodes be subject to such ROW fees because cable operators offer wireless broadband services to cable and broadband internet subscribers using these devices. In addition, several cable operators have announced their intention to offer wireless service using their Wi-Fi hot spots, many of which are located in municipal ROW. On April 6, 2017, Comcast issued a press release announcing the introduction of its wireless service called Xfinity Mobile. The new wireless service may be bundled with Comcast's video streaming services (video streaming of cable programming content).

The cable industry is already deploying Wi-Fi equipment in municipal ROW in cities across the state, and it is using this bill to insulate cable operators from paying any ROW rent or from paying additional franchise fees on the wireless delivery of video streaming. The bill includes a provision that will prohibit municipalities from collecting the 5% cable franchise fee on video streaming services delivered over Wi-Fi access points. This provision also benefits other video service providers, such as AT&T and Verizon regarding the wireless delivery of video streaming to U-verse and Fios subscribers, respectively, provided over network nodes. Concurrently, the bill exempts Wi-Fi access points from the municipal application permitting process and from payment of any ROW rent. The cable operators should not be able to have it both ways. They should either pay ROW rent or pay 5% of gross revenues on video streaming services provided over Wi-Fi devices.

- ***Remedy:*** *Each micro network node should be subject to a \$50 annual ROW fee.*